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OFFICE OF THE GENERAL COUNSEL

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May 28, 1998

Ms. Joanne Polayes
Toxics Cleanup Program
Northwest Regional Office
Department of Ecology
3190 – 160th Ave. S.E.
Bellevue, WA 98008-5452

Re: Bremerton Auto Wrecking Landfill

Dear Ms. Polayes:

I am writing to set up a meeting with you to discuss the Navy's participation in cleanup efforts at the above-referenced site. There are certain issues that will need to be discussed and resolved before the Navy can participate in remedial action at this site. While there are a number of issues, I take this time to outline the major issues.

As a threshold issue, it must be recognized that Washington's Model Toxics Control Act ("MTCA") does not apply against the Navy at this site. The waiver of sovereign immunity under section 120(a)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §120(a)(4), limits the United States' waiver of sovereign immunity for state laws concerning removal and remedial action to facilities that are currently owned or operated by the federal government. The waiver does not extend to facilities not currently owned by the federal government. See Coleman v. Port of Bremerton, W.D. Wash. No.. C93-5458(D)WD (Order dated November 29, 1993); Crowley Marine Services, Inc. v. Fednav LTD, 915 F. Supp. 218 (E.D. Wash. 1995). As you may know, the Bremerton Auto Wrecking Landfill site is not now, and never has been, owned by the Navy. Nevertheless, despite the waiver issue, the Navy wishes to cooperate with Ecology in whatever manner possible and is therefore willing to explore cooperative efforts with Ecology and the other parties at this site to address Ecology's concerns.

A second major issue concerns Ecology's suggestion that the Navy undertake an independent cleanup of the site. Ecology's MTCA regulations make clear that independent cleanup actions are done at the party's own risk and that Ecology may take or require additional remedial actions at any time. The open-ended risk of an independent cleanup action, compounded by the fact that the Navy does not own the property, does not appear to be a prudent use of taxpayer funds. A related issue is that

performing an independent remedial action without appropriate Ecology involvement may not preserve CERCLA cost recovery claims the Navy would have against other potentially liable parties ("PLPs").

As a result, I propose we explore a partnering arrangement with Ecology. Under this approach, we would expect Ecology to engage in a collaborative process with the Navy and other parties to achieve an expeditious cleanup, and ultimately a no further action determination, in the most cost-effective manner. This approach would allow the Navy to avoid any unnecessary risk while at the same time achieving Ecology's principal objectives. It would also be consistent with Ecology's regulations, which allow Ecology to be involved in oversight over independent cleanups through a "prepayment agreement." See WAC 173-340-550(8).

A third major issue concerns the participation of other PLPs. There appears to be information indicating that there is at least one other PLP, a former owner and operator of the site in the 1970s, with sufficient financial resources to contribute to cleanup efforts. As a matter of fairness, the Navy will expect Ecology to use its enforcement authorities to bring this PLP into the process.

Please call me at (360) 396-0039 to set a meeting here at my offices in Poulsbo at a mutually convenient date. By copy of this letter to counsel for Ms. Uhinck, I also invite the Uhinck party to this meeting.

While the foregoing outlines the major issues for the Navy, there are minor issues that we will need to discuss as well. In advance of a meeting, I will provide an agenda identifying all the issues in detail.

Sincerely,

Eric W. Hanger

ERIC W. HANGER
Assistant Counsel

Cc: Brad Jones, Esq.